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Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-28–05 OF 2013(W)
RAUS SHARIF PCA, SURIYADI, ZAINUN ALI, JEFFREY TAN AND ABU SAMAH NORDIN FCJJ
10 DECEMBER 2014

C

Land Law — Charge — Execution of — Order for sale by public auction — Sums due under auction sale paid but property could not be transferred due to private caveat — Whether notice of adjourned hearing of application for sale served on chargor — Whether judges of Court of Appeal and High Court D *misdirected themselves in law with regard to position of chargee and purchaser in auction sale — Whether there was breach of contract caused by either party to condition of sale*

The respondent, the bank/chargee of a piece of land, had successfully obtained E an order for sale by public auction of the property from the High Court. The deputy registrar of the High Court conducted the sale, assisted by a licensed auctioneer. The appellant successfully bid for the property at RM116,000 and on the same day, the appellant paid a deposit of 10% of the purchase price. The appellant also paid all sums due under the auction sale but the property could F not be transferred to him as there was a private caveat lodged on the property by the chargor's daughter. The chargor of the property applied to the High Court to set aside the order for sale and the sale of the property at the auction held. The primary reason of the application was that the notice of adjourned hearing of the application for sale was not served on the chargor. The appellant G had intervened and was made a party to the chargor's application to set aside the order for sale. The High Court set aside the order for sale and the sale of the property by public auction. The purchase price paid was also order to be fully refunded to the appellant. The bank appealed against the decision of the High Court to the Court of Appeal but the appeal was dismissed on the ground that H the order for sale of the property was tainted with impropriety due to the bank's failure to adhere to the provisions of the National Land Code. The bank applied for leave to appeal to the Federal Court but the same was dismissed. Meanwhile, the appellant filed an action against the bank for monetary compensation, pleading breach of contract, misrepresentation, negligence and I breach of duties, whether contractually, statutorily, fiduciary or otherwise. The High Court dismissed the appellant's action and so did the Court of Appeal. Hence, the present appeal. The appellant submitted that the judges of the Court of Appeal and the High Court had misdirected themselves in law with regard to the position of a chargee and a purchaser in an auction sale.

Held, dismissing the appeal with costs:

(1) The property could not be transferred and registered to the appellant due to the private caveat entered by the daughter of the chargor about two months prior to the appellant having paid full purchase price. Although a certificate of sale was issued to the appellant by the court, the sale could not be completed as there was a change of circumstances. Since the certificate of sale could not be registered due to the existence of the caveat and would never be capable of being registered until the end, the title or interest of the property still remained with the chargor. Thus, the appellant could not become the registered proprietor of the property not because the bank had breach the terms of the judicial contract but because the order for sale was set aside some nine years later. There was no breach of contract caused by either party to the condition of sale (see para 19).

(2) Since order for sale was set aside, the judicial contract became null and void ie no contract was struck between the respondent and the appellant and the appellant had been put back to his original position, which means his position before the judicial contract took place. Since there was no breach of contract on the part of the bank, the issue of monetary compensation as claimed by the appellant did not arise. The claim for damages by the appellant must also fail (see paras 19–21).

(3) The appellant's claim against the respondent must fail. The appellant failed to establish that there was a breach of contract, misrepresentation, negligence and breach of fiduciary duty on the part of the bank. The order for sale, which was set aside, rendered the whole transaction void ab ignitio. In law, no contract for sale existed. In these circumstances, the appellant was not entitled over and above the refunded purchase price (see para 23).

[Bahasa Malaysia summary

Responden, bank/pemegang gadaian sebidang tanah, telah berjaya memperolehi perintah jualan oleh lelongan awam terhadap hartanah daripada Mahkamah Tinggi. Timbalan pendaftar Mahkamah Tinggi menjalankan jualan tersebut, dibantu oleh pelelong berlesen. Perayu berjaya membida untuk hartanah tersebut pada harga RM116,000 dan pada hari yang sama, perayu membayar deposit sebanyak 10% daripada harga belian tersebut. Perayu juga membayar kesemua jumlah yang kena dibayar di bawah jualan lelong tersebut tetapi hartanah tidak boleh dipindahkan kepadanya kerana terdapat kaveat persendirian yang dimasukkan ke atas hartanah tersebut oleh anak perempuan penggadai. Penggadai hartanah tersebut memohon kepada Mahkamah Tinggi untuk mengetepikan perintah jualan tersebut dan jualan hartanah tersebut di lelongan yang dijalankan. Alasan utama permohonan adalah bahawa notis pendengaran yang ditangguhkan terhadap permohonan untuk jualan tidak

diserahkan ke atas penggadai. Perayu telah mencelah dan dimasukkan sebagai pihak kepada permohonan penggadai untuk mengetepikan perintah jualan. Mahkamah Tinggi mengetepikan perintah jualan dan jualan hartanah oleh lelongan awam. Harga belian yang dibayar juga diperintahkan dibayar balik kesemuanya kepada perayu. Bank merayu terhadap keputusan Mahkamah Tinggi kepada Mahkamah Rayuan tetapi rayuan ditolak atas alasan bahawa perintah jualan hartanah dicemar dengan kesalahan akibat kegagalan bank untuk mematuhi kepada peruntukan Kanun Tanah Negara. Bank memohon untuk izin merayu kepada Mahkamah Persekutuan tetapi ianya ditolak. Sementara itu, perayu memfailkan tindakan terhadap bank untuk pampasan wang, memplid pelanggaran kontrak, salah nyata, kecuaian dan pelanggaran kewajipan, sama ada secara kontrak, statutori, fidusiari atau sebaliknya. Mahkamah Tinggi menolak tindakan perayu dan begitu juga Mahkamah Rayuan. Maka, rayuan ini. Perayu berhujah bahawa hakim-hakim Mahkamah Rayuan dan Mahkamah Tinggi telah tersalah arah diri mereka dari segi undang-undang berkaitan kedudukan pemegang gadaian dan pembeli dalam jualan lelong.

Diputuskan, menolak rayuan dengan kos:

(1) Hartanah tidak boleh dipindahkan dan didaftarkan kepada perayu akibat kaveat persendirian yang dimasuki oleh anak perempuan penggadai lebih kurang dua bulan sebelum perayu membayar penuh harga belian. Walaupun sijil jualan dikeluarkan kepada perayu oleh mahkamah, jualan tidak boleh selesai kerana terdapat perubahan keadaan. Memandangkan sijil jualan tidak boleh didaftarkan akibat kepada kewujudan kaveat dan tidak dapat didaftarkan sehingga akhir, hak milik atau kepentingan hartanah masih kekal dengan penggadai. Oleh itu, perayu tidak boleh menjadi pemilik berdaftar hartanah bukan kerana bank telah melanggar syarat-syarat kontrak kehakiman tetapi kerana perintah jualan tersebut diketepikan lebih kurang sembilan tahun kemudiannya. Tidak terdapat pelanggaran disebabkan oleh kedua-dua pihak kepada syarat jualan (lihat perenggan 19).

(2) Memandangkan perintah jualan diketepikan, kontrak kehakiman menjadi tak sah dan batal iaitu tiada kontrak yang dimasuki di antara responden dan perayu dan perayu telah dikembalikan kepada kedudukan asalnya, yang bermaksud kedudukannya sebelum kontrak kehakiman dibuat. Memandangkan tidak terdapat pelanggaran kontrak oleh pihak bank, isu pampasan wang seperti yang dituntut oleh perayu tidak berbangkit. Tuntutan untuk ganti rugi oleh perayu juga mesti gagal (lihat perenggan 19–21).

(3) Tuntutan perayu terhadap responden mesti gagal, perayu gagal untuk membuktikan bahawa terdapat pelanggaran kontrak, salah nyataan, kecuaian dan pelanggaran kewajipan fidusiari oleh pihak bank. Perintah

jualan, yang mana diketepikan, menyebabkan keseluruhan transaksi *void ab ignitio*. Dari segi undang-undang, tiada kontrak untuk jualan yang wujud. Dalam keadaan ini, perayu tidak berhak untuk tambahan kepada harga belian yang dibayar balik (lihat perenggan 23).]

Notes

For a case on execution of charge, see 8(2) *Mallal's Digest* (5th Ed, 2015) para 2783.

Cases referred to

Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners) [1992] 1 MLJ 472, HC (refd)

Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan [1990] 1 MLJ 317, HC (refd)

Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-Malaysian Finance Bhd & Anor [2003] 4 MLJ 447; [2003] 2 CLJ 505, CA (refd)

Legislation referred to

Limitation Act 1953 s 6(1)
National Land Code 1965 s 256
Rules of the High Court 1980 O 83

Appeal from: Civil Appeal No W-02–1104 of 2011 (Court of Appeal, Putrajaya)

Balbir Singh (Ho Hon Keong with him) (Najiana Wan Balbir) for the appellant.
Kingston Tan (Shantini Koshy and YQ Phoon with him) (Yong & Rakan Rakan) for the respondent.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the judgment of the Court of Appeal dated 4 October 2012 in affirming the judgment of the High Court in dismissing the appellant's action against the respondent.

[2] This court on 25 March 2014 granted the appellant leave to appeal on a single question of law which reads:

> Whether a purchaser who at a public auction purchases and completes a sale has rights and remedies against the chargee bank when the Order for Sale is subsequently set aside by the chargor (a 3rd party to the contract of sale), on the ground that there was non-compliance of Rules of the High Court by the chargee bank?

A FACTS

[3] On 15 February 1988, the respondent, Malayan Banking Bhd ('chargee bank') as chargee of a piece of land held under Grant No 9611, Lot 26673, Mukim Kuala Lumpur ('the property') obtained an order for sale by public auction of the property from the Kuala Lumpur High Court.

[4] On 12 September 1990, the deputy registrar of the High Court conducted the sale assisted by a licensed auctioneer. The appellant successfully bid for the property at RM116,000. On the same day, the appellant paid a deposit in the sum of RM11,600 being 10% of the purchase price.

[5] Thereafter, the appellant duly paid all sums due under the auction sale. However, the property could not be transferred to him as there was a private caveat lodged on the property on 24 September 1990 by the daughter of the chargor.

[6] On 14 March 1991, the chargor of the property applied to the High Court to set aside the order for sale dated 15 February 1988, as well as the sale of the property at the auction held on 12 September 1990. The principal ground of the application was that the notice of adjourned hearing of the application for sale was not served on the chargor. The appellant had intervened and was made a party to the chargor's application to set aside the order for sale.

[7] On 14 June 1997, the High Court granted the orders applied by the chargor. The order for sale, as well as the sale of the property by public auction was set aside. It was also ordered that the purchase price paid to be fully refunded to the appellant and damages to be assessed and paid by the chargee bank to the chargor, as well as the appellant.

[8] The chargee bank then appealed against the decision of the High Court to the Court of Appeal. On 23 November 2002, the Court of Appeal dismissed the chargee bank's appeal. It was held that the order for sale of the property was tainted with impropriety due to the chargee bank's failure to adhere to the provisions of the National Land Code ('the NLC') and O 83 of the Rules of the High Court 1980. Accordingly, the Court of Appeal affirmed the order of the High Court that the purchase price paid by the appellant be refunded in full. However, the order of the High Court for damages to be assessed and paid to the chargor and the appellant was set aside.

[9] Aggrieved with the decision of the Court of Appeal in affirming the decision of the High Court in setting aside the order for sale and hence the sale of the property, the chargee bank applied for leave to appeal to the Federal Court. The application was dismissed.

[10] Unlike the chargee bank, the appellant did not pursue the matter further to the Federal Court. Instead on 16 December 2004, the appellant filed an action at the High Court against the chargee bank for monetary compensation, pleading breach of contract, misrepresentation, negligence and breach of duties whether contractually, statutory, fiduciary or otherwise.

AT THE HIGH COURT

[11] On 23 March 2011, the High Court Kuala Lumpur, after a full trial dismissed the appellant's action. In summary, the learned judicial commissioner ('the trial judge') in her written judgment dated 18 June 2011, gave the following reasons:

(a) there was no breach of contract as alleged;

(b) there was no actionable misrepresentation, whether negligent or innocent;

(c) the appellant did not particularise the breach of duty alleged;

(d) the appellant was uncertain of his causes of action;

(e) the appellant's action was barred by limitation;

(f) the appellant failed to mitigate his losses; and

(g) the appellant had been fully refunded for the purchase he paid for the said property at the auction and so should not be unjustly enriched by payment of damages.

AT THE COURT OF APPEAL

[12] On 4 October 2012, the Court of Appeal dismissed the appellant's appeal. The Court of Appeal speaking through Clement Allan Skinner JCA held that:

(a) it was not correct to describe the chargee bank as 'Vendor' which was what the appellant was trying to do. The use of the term 'the Vendor' to describe the chargee bank in the contract of sale does not detract in any way from the fact that the chargee bank had sold the said property as 'Chargee';

(b) the reason the appellant could not become the registered proprietor of the said property was not because the chargee bank had breached the

terms of the alleged 'contract' which was entered into after the successful auction, but because the order for sale was set aside some nine years later, on grounds totally unrelated to the contract of sale entered into after the auction. Therefore, the chargee bank cannot be said to be in breach of contract;

(c) the chargee bank was not in breach of a collateral warranty as at the time the appellant bid for the auction, there was still a perfectly valid order for sale;

(d) the chargee bank was not guilty of the various misrepresentations, negligence and breach of duty as alleged by the appellant as the auction sale was made pursuant to a valid order of the court; and

(e) the appellant's causes of action against the chargee bank were founded on contract and tort and would have accrued when the High Court set aside the order for sale on 14 June 1997.

However, the appellant commenced this suit only on 16 December 2004, which was well after six years and thus in violation of s 6(1) of the Limitation Act 1953.

BEFORE THE FEDERAL COURT

[13] The same issues raised before the Court of Appeal was ventilated before us by the appellant. As stated earlier, the Court of Appeal held that there was no contract between the appellant and the chargee bank as the chargee bank was merely enforcing its rights as a chargee by exercising its statutory remedy against the chargor. Before us, it was submitted by learned counsel for the appellant that the judges of the Court of Appeal as well as the trial judge had misdirected themselves in law with regard to the position of a chargee and a purchaser in an auction sale.

[14] Learned counsel did not dispute the fact that the chargee bank was exercising its statutory remedy of sale as chargee of the property under the NLC. However, he contended that the chargee bank in exercising such powers must be regarded as the vendor in a forced sale as the chargor had abrogated his rights and powers to dispose the property in the form of a charge when he defaulted on the provision of the charge. Thus, he contended that the term 'Vendor' used in the contract of sale to denote the chargee bank was not a mere term of convenience but reflected the actual capacity in which the chargee bank undertook the sale vis a vis the appellant as the purchaser.

[15] In support of the above contention, learned counsel referred to the case of *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 where VC George (as he then was) held at p 391:

In a forced sale pursuant to s 256 of the National Land Code, the charge at whose instance the sale is effected is to be regarded as the vendor.

... The sale takes place in terms of the order for sale made and the conditions of sale imposed 'in accordance with the order and any determination thereunder by the registrar of the court'. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement.

[16] It was pointed out by learned counsel that the above position was endorsed by the Court of Appeal, in the case of *Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-Malaysian Finance Bhd & Anor* [2003] 4 MLJ 447; [2003] 2 CLJ 505, where Abdul Aziz Mohamad JCA (as he then was) held:

In the case of an order for sale of land charged under the National Land Code, VC George J (as he then was) held in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the charge as vendor and the purchaser. Likewise I would regard the order for sale and the sale conditions in this case as the sale and purchase agreement between the respondents and the purchaser.

[17] Learned counsel also referred to the case of *Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, interveners)* [1992] 1 MLJ 472, where Lim Beng Choon J held at p 484:

The final question is whether the SAR has jurisdiction to allow the time for payment to be extended for a further two weeks with effect from the date of his letter of 18 October 1989 (see exh YPK2 annexed to encl 14). Under a force sale of land subject to a charge pursuant to s 256 of the National Land Code, the fact that the sale is conducted by the court or its registrar does not mean that the court or its registrar has an interest in the sale or any dispute arising therefrom. The registrar/licensed auctioneer sells the property as agent of the chargee who is the real vendor. ...

[18] In response, learned counsel for the chargee bank submitted that the so called contract between the appellant and the chargee bank was a judicial contract which emanated from the order for sale validly granted by the High Court on 15 February 1988. It was argued that since the order for sale was subsequently held to be void by the Court of Appeal the subsequent acts done pursuant to the sale were null and void. Thus, the issue of breach does not arise as there was no contract nor any term of the contract for the chargee bank to have said to be breached.

[19] We are inclined to agree with the position taken by learned counsel for the chargee bank. In this case, it is an undisputed fact that the property could not be transferred and registered to the appellant due to the private caveat entered by the daughter of the chargor about two months prior to the appellant

having paid the full purchase price. Although a certificate of sale was issued to the appellant by the court, the sale could not be completed. There was a change of circumstances. Since the certificate of sale could not be registered due to the existence of the caveat and would never be capable of being registered until the end, the title or interest of the property still remained with the chargor. Thus, the appellant could not become the registered proprietor of the property not because the chargee bank had breached the terms of the judicial contract, but because the order for sale was set aside some nine years later. Arguably, there was no breach of contract caused by either party (chargee bank and the appellant bidder) to the condition of sale. In this regard we agree with the respondent that since the order for sale was set aside, the judicial contract dated 12 September 1990 became null and void, ie no contract was struck between the respondent and the appellant, and the appellant had been put back to his original position, which means his position before the judicial contract took place.

[20] It is our judgment that since there was no breach of contract on the part of the chargee bank, the issue of monetary compensation as claimed by the appellant does not arise. As stated earlier, the order for sale was declared nine years later to be void by the High Court and affirmed by the Court of Appeal on the ground of non-compliance of the provisions of NLC and O 83 of the Rules of the High Court 1980 by the chargee bank. As rightly pointed out by learned counsel for the respondent, when the order for sale was declared void all that followed in its wake was equally void. The Court of Appeal was right in dismissing the appellant's appeal and in upholding the decision of the trial judge in dismissing the appellant's claim against the chargee bank.

[21] Since it is our finding that there was no breach of contract in the first place to entitle the appellant to initiate this suit, in our considered view the claim for damages by the appellant must also fail.

[22] Another pertinent point which needs to be highlighted here is the inaction on the part of the appellant. The High Court allowed the chargor's application to set aside the order for sale on 14 June 1997. It was ordered that the purchase price be fully refunded to the appellant herein and damages to be assessed and paid by the chargee bank to the chargor and the appellant. On 23 November 2002 the chargee bank appealed to the Court of Appeal against the High Court order. The Court of Appeal dismissed the chargee bank's appeal. The Court of Appeal affirmed the High Court's decision in setting aside the order for sale. However, the High Court's decision in ordering that damages be assessed and paid by the chargee bank to the chargor and the appellant was set aside by the Court of Appeal. The order for the refund of the purchase price to the appellant stood. The appellant did not pursue the matter further to the Federal Court against the decision of the Court of Appeal in setting aside the

High Court order as to the assessment of damages. Instead, the appellant after having received the refund of the purchase price filed a separate action against the respondent for damages. In our considered view it would be unconscionable for the appellant to claim for damages now when in the first place he elected not to pursue the matter further against the order of the Court of Appeal in setting aside the High Court order for assessment of damages in his favor. In this regard we are in agreement with the views expressed by the learned trial judge in the following passage in para 21 of the grounds of judgment which is reproduced below:

> [21] The above order of the High Court and affirmed by the Court of Appeal for the whole amount paid by the plaintiff towards the purchase price for the purpose of the said sale had put the plaintiff back to the position of status quo ante or original position, that is, the position before the transaction took place. Further the full purchase price had been paid to the plaintiff in full, the plaintiff should not therefore now be allowed to take the benefit from the refund of the purchase price and then to also benefit against for damages allegedly for breach of contract. In short the plaintiff should not be allowed to have a second bite of the cherry

[23] To sum up, based on the facts and the laws analysed above, it is our finding that the appellant's claim against the respondent must fail. We reiterate our earlier stand that the appellant failed to establish that there was a breach of contract, misrepresentation, negligence and breach of fiduciary duty on the part of the chargee bank. The order for sale which was set aside rendered the whole transaction void ab initio. In law no contract for sale existed. In these circumstances, the appellant was not entitled over and above the refunded purchase price. That will be our answer to the question of law posed in this appeal.

[24] For the above reasons, we dismiss the appeal with costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor